

IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA (RICHMOND)

In re)	Case No. 08-35653-KRH
)	Richmond, Virginia
CIRCUIT CITY STORES, INC.,)	
Debtor.)	July 30, 2014
)	2:08 PM
Alfred H. Siegel,)	Adv. Proc. No. 10-03600-KRH
Plaintiff,)	
v.)	
Sony Electronics Inc.,)	
Defendant.)	
Alfred H. Siegel,)	Adv. Proc. No. 10-03571-KRH
Plaintiff,)	
v.)	
State of Illinois Department)	
of Revenue, through Brian)	
Hamer, its Director,)	
Defendant.)	

TRANSCRIPT OF HEARING ON

FOR ADV. PROC. NO. 10-03600-KRH: MOTION OF PLAINTIFF TRUSTEE
ALFRED H. SIEGEL FOR PARTIAL SUMMARY ADJUDICATION AS TO CLAIMS
III, V, VI AND VII OF THE SECOND AMENDED COMPLAINT, AND
MEMORANDUM IN SUPPORT THEREOF [DOCKET No. 107];

FOR ADV. PROC. NO. 10-03571-KRH: MOTION FOR SUMMARY JUDGMENT
ON BEHALF OF ALFRED H. SIEGEL [DOCKET NO. 7];

FOR 08-35653-KRH: DEBTORS' THIRTY-FIRST OMNIBUS OBJECTION TO
CLAIMS (DISALLOWANCE OF CERTAIN LEGAL CLAIMS) (DOCKET NO.
4585) - MOTION OF ALFRED H. SIEGEL, TRUSTEE, FOR SUMMARY
ADJUDICATION DISALLOWING IN FULL CLAIM NO. 6555 FILED BY
UNICAL ENTERPRISES, INC. [DOCKET NO. 13373];

LIQUIDATING TRUST'S THIRTY-FIRST OMNIBUS OBJECTION TO CLAIMS
(DISALLOWANCE OF CERTAIN INVALID CLAIMS) AND NOTICE OF
LIQUIDATING TRUST'S THIRTIETH OMNIBUS OBJECTION TO CLAIMS
(DISALLOWANCE OF CERTAIN INVALID CLAIMS) [DOCKET NO. 11809]

BEFORE THE HONORABLE KEVIN R. HUENNEKENS,
UNITED STATES BANKRUPTCY JUDGE

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1 THE CLERK: All rise. Court is now in session.

2 Please be seated and come to order.

3 THE CLERK: Circuit City Stores, Inc., items 1

4 through 4 on proposed agenda.

5 MR. FEINSTEIN: Good afternoon, Your Honor.

6 THE COURT: Good afternoon.

7 MR. FEINSTEIN: For the record, Robert Feinstein,
8 Pachulski Stang Ziehl & Jones, counsel for the Circuit City
9 Trust. With me today, Your Honor, is my partner, Mr. Caine,
10 my cocounsel, Ms. Beran and Ms. Tavenner, and from the Circuit
11 City Trust Ms. Ferguson, Ms. Bradshaw, and Ms. Fose.

12 THE COURT: All right. Very good.

13 MR. FEINSTEIN: Your Honor, the Sony matter is the
14 first item up on the calendar, and on that basis let's propose
15 to take that up first.

16 THE COURT: I think that'd be a great idea.

17 MR. FEINSTEIN: Okay. Thank you.

18 Your Honor, the matter before you today is the
19 Trust's motion for partial summary judgment. As we indicated
20 in the opening paragraph of that motion, it was necessitated
21 by our efforts to get Sony to reconcile the credits, that are
22 asserted through various causes of action in the complaint, of
23 approximately seventy-three million dollars, and Sony's
24 refusal -- despite continued protestations to the contrary in
25 their papers -- Sony's refusal to engage in a reconciliation of

1 those credits on a substantive basis that the credits were
2 duly earned under the applicable program requirements.

3 Sony has indicated they were prepared to stipulate
4 that certain matters were submitted, but we really wanted to
5 get to the heart of the matter to try to narrow the issues for
6 trial, because the seventy-three million of credits, the
7 chargebacks, bill backs, et cetera, are quite voluminous, as
8 we indicated in our paper. The evidence supporting those
9 credits fills binders that are taller than I am. And I know
10 that's not much, but still, it's a lot of paper.

11 Now, we have tried, but failed, to get Sony to engage
12 on this. So we moved, really, in an effort to substantially
13 minimize the evidence that we would have to adduce at trial.
14 And we would also like to flush out --and it turns out, by way
15 of cross-motion, I think we have, in part --some of Sony's
16 asserted legal defenses, because they've been dancing around
17 these issues, really, for years at this point.

18 But I do want to focus on the relief that's sought in
19 our motion, which was largely for a factual determination that
20 the seventy-three million in credits were earned under various
21 programs or for bill backs and warranty claims and the like
22 and that under the terms of the programs that gave rise to the
23 earning of those credits that Circuit City was in compliance
24 and that the credits are good, reserving for a later date,
25 whether by subsequent motion practice or at trial, any kind of

1 legal arguments, overarching legal arguments that Sony might
2 have with respect to Circuit City's entitlement to those
3 credits or to use those credits.

4 And in that respect the motion served its purpose.
5 On Friday Sony filed its opposition to the motion as well as
6 two declarations. They also filed a cross-motion and,
7 finally, a motion, I guess seeking to have today's hearing
8 continued and to have today's motion consolidated with their
9 cross-motion for summary judgment, to be heard sometime in
10 August. They noticed their motion for the August 27th omni
11 but asked to have it heard earlier. As I'll get to Your
12 Honor, we're actually prepared to schedule an earlier hearing
13 on a summary judgment motion, and we'd like to make a cross-
14 motion as well.

15 But let me come back to what's on for today. We
16 think the motion should go forward today insofar as it seeks a
17 determination by the Court that the credits were validly
18 earned under the applicable programs. And I think Sony's
19 responsive papers actually made matters quite easy, because,
20 as we'll demonstrate, they've conceded that fifty million of
21 the seventy-three million of credits and chargebacks were
22 earned under and in compliance with the programs.

23 And, in fact, I have a demonstrative, if I could hand
24 up to Your Honor?

25 So, Your Honor, Sony submitted both an opposition and

1 two declarations, and specifically in the declaration of Ms.
2 Chang, who's an attorney with the Friedman Kaplan firm, she so
3 much as acknowledged that 49.8 million dollars worth of
4 credits were proper and earned under the program, subject to,
5 again, whatever overarching legal arguments Sony may have.

6 So in the demonstrative that I presented to Your
7 Honor the top box, if you will, the total receivables of 72.8
8 million, these are the items that are listed in the adversary
9 complaint.

10 In the middle box there are several line items that
11 add up to forty-nine million. The first line item is 40.9
12 million, and in Ms. Chang's declaration and in column 6 of
13 Schedule Ashe acknowledges, on Sony's behalf, that 40.9
14 million of the credits were in compliance with the program
15 requirements and not disputed on that basis. So that's a huge
16 relief from an evidentiary standpoint in that so much of what
17 had been the subject of a general denial before we now know is
18 admitted.

19 In addition, Ms. Chang points out that 7.8 million,
20 the next line item in the middle box, is also acknowledged as
21 in compliance with the program requirements. The difference
22 that the parties have over this bucket, if you will, of
23 credits is that Sony said that they basically set off these
24 claims before they filed their proof of claim, their general
25 unsecured claim. So while there's been a lot of dancing

1 around in this case about whether or not Circuit City can use
2 credits as offsets against pending receivables, here Sony's
3 actually done it in the context of preparing and filing a
4 proof of claim that took 7.8 million of credits, which Ms.
5 Chang says, on Sony's behalf, are undisputed, earned under the
6 program, and Sony chose to apply them to their pre-petition
7 claim.

8 The Trust's position is that we agree the credits are
9 valid but that they're usable by the Trust to offset, in the
10 first instance, Sony's 503(b)(9) claims. So we just differ on
11 how these undisputed credits would be used as offsets, whether
12 to the 503(b)(9) or the pre-petition.

13 The last two items are rather relatively small dollar
14 amounts, warranty claims and pricing deductions and shortage
15 claims. These are also acknowledged in Sony's papers as valid
16 and undisputed on a factual basis, once again, subject to
17 whatever arguments they want to make on an overarching basis
18 about statute of limitations or the rider or otherwise. So
19 you get to a total of 49.8 million dollars of credits that are
20 factually undisputed, in compliance with the programs or the
21 other pertinent provisions of the agreements, subject to their
22 legal defenses.

23 So the balance of 22.9 million is identified by Sony
24 as being in dispute. And this was what we were trying to
25 flesh out by way of this motion. So we now know the universe

1 of claims that they contend are either not adequately
2 documented or not in compliance with the programs, and we're
3 happy to deal with these at trial. We think we have
4 substantial evidentiary support. We will prove those claims
5 out. But at least for today what we'd like the Court to find
6 is that approximately fifty million dollars of credits are now
7 conceded, undisputed, and that we don't have to go through any
8 evidentiary hearings, testimony, what have you, to prove out
9 those claims at trial.

10 Now, aside from the statute of limitations argument,
11 which we're going to propose, Your Honor, we address at the
12 same time as Sony's cross-motion for summary judgment, the
13 only other argument made by Sony in their motion papers is an
14 assertion that the plaintiff, the Trust, hasn't come up with
15 adequate evidence on this motion, competent, admissible
16 evidence to establish the credit claims. And it is correct
17 that the only submission made by the Trust was the declaration
18 of Ms. Fose, who's in the courtroom, who has extensive
19 knowledge of the company's business records and programs and,
20 more to the point, can establish through Circuit City's
21 business records how these programs functioned, how the
22 credits were earned. And so we think her evidence is more
23 than competent and admissible. But even the attack on Ms.
24 Fose's knowledge or competence, if you will, is really, kind
25 of, academic at this point, because in their papers Sony has

1 admitted that fifty million dollars of the credits were
2 earned.

3 So we think there is no bar to the entry of an order
4 today finding that at least as to the fifty million dollars of
5 conceded credits there is no disputed issue of fact and that
6 these credits were duly earned under the program, because
7 Circuit City met all their requirements, because this has been
8 admitted by Sony in the context of these motion papers.

9 So now let me address the final argument that Sony
10 made, which is the statute of limitations argument. Sony's
11 made a cross-motion. What we would propose, Your Honor, is
12 that the portion of their opposition to this motion dealing
13 with the statute of limitations issue be consolidated with the
14 hearing on their motion. And what we would propose in terms
15 of trying to expedite that determination that Sony requested,
16 subject to Your Honor's calendar, is that that matter be heard
17 on August the 21st, which is one of the few days in August
18 that we don't have a deposition scheduled.

19 And as I indicated, Your Honor, we'd like to cross
20 move. And the purpose of the cross-motion is to assert that
21 even assuming for the sake of argument that these claims are
22 time barred, and we will lay out why they're not, but even
23 assuming for the sake of argument that they were, under the
24 doctrine of equitable recoupment the Trust can use those very
25 same claims, without any limitations being applicable, to

1 offset Sony's claims. These all arise out of the master
2 dealer agreement.

3 We'll lay this out in our briefs and affidavits in
4 connection with the summary judgment motion to be heard in
5 August, but under the doctrine of equitable recoupment the
6 fifty to seventy-three million dollars of claims could be used
7 to offset Sony's claims without regard to limitations.

8 And Sony's asserted a 503(b)(9) claim of, I believe,
9 forty-two million dollars, a general unsecured claim in the
10 neighborhood of fourteen million dollars. If you take back
11 the credits that they apply, that seven million dollars of
12 credits that they apply to the unsecured, their claim goes up
13 a bit. But we feel that we have enough in the way of valid
14 credits to offset the entirety of their claims.

15 And so even if statute of limitations is an issue,
16 and we don't think it's a valid one, through recoupment we get
17 to, essentially, the same place, which is the cancellation of
18 all their claims. And at that point we're only talking about
19 a dispute over the excess of the seventy-three million over
20 the amount of their claims and whether those can be asserted
21 affirmatively. I think that's where the no cash value issue
22 comes into play. But in terms of offsetting Sony's -- the
23 entirety of Sony's claims -- recoupment will clearly work,
24 even if the statute of limitations is an issue.

25 Again, just to preview, Your Honor, we don't think

1 statute of limitations is an issue, because Sony's argument
2 conflates when the credits were earned with when the statute
3 of limitations begins to run, because a limitations period
4 runs when there's a breach of contract. So Sony's argument
5 that the credits were earned on day one and therefore you had
6 eighteen months, really, it misses the mark, because at some
7 point along the way Sony denied the use of those credits.
8 That would be the dishonoring of the contract. That's the
9 action that gives rise to the breach of contract claim as to
10 which an eighteen-month statute --

11 We don't think that that occurred until, perhaps,
12 2010, because -- and, again, we'll prove this out in the next
13 set of briefing -- from the time that Circuit City shut down
14 through the time this adversary was commenced there was a lot
15 of back-and-forth with Sony asking about the credits, but they
16 never really denied them. And, as I've said, for years since
17 then, Your Honor, we've been hearing there's a rider argument.
18 There is cash value. We've never really heard a clear
19 defense, but we never really heard clearly no, these credits
20 won't be honored until well after the time period that the
21 credits were earned. So, again, we'll brief that in the next
22 go-around. But I think the appropriate way to do that, Your
23 Honor, would be to cross move to their motion on statute of
24 limitations to brief the recoupment issue to show how it
25 works.

1 So, Your Honor, I think I might stop here, because I
2 think through their concession about the fifty million we've
3 really accomplished what we set out to do with this motion,
4 which is to substantially narrow the factual issues. We think
5 it's ripe for a judicial determination that as to those
6 credits they're undisputed in terms of their compliance with
7 the program requirements. And the balance of the issues that
8 are raised we can address in the context of Sony's summary
9 judgment motion and our cross-motion.

10 THE COURT: All right. Well, let me ask. I guess
11 the question that immediately comes to my mind, which is if
12 I'm coming back on the 21st or the 27th or whatever to hear
13 cross-motions for summary judgment why don't I entertain
14 Sony's motion today to continue this hearing to that date and
15 just decide everything at one time, as I had suggested last
16 time it would probably be best to do, rather than to take it
17 in a piecemeal thing? Because I suspect that I'm going to
18 hear in just a second that no, they haven't conceded fifty
19 million dollars. I'm just thinking that might happen. But
20 why wouldn't that be the better procedure to follow here?

21 MR. FEINSTEIN: Your Honor, honestly, we don't have a
22 strong feeling about this. I mean, the important thing was
23 fleshing out that there was no contest as to the validation of
24 fifty million dollars of credits. Whether Your Honor puts it
25 in an order or not, it's in Sony's papers.

1 We have got a month of depositions coming up. We've
2 really been trying to narrow the issues. So we've achieved
3 that, and we have no problem with Your Honor deferring the
4 entry of an order on this point until sometime in August when
5 the matter's heard.

6 There are other respects, Your Honor, in which we'd
7 like to get the rest of their legal arguments on the table.
8 It's been a struggle, but I'm going to, I think, reserve on
9 that for now.

10 THE COURT: Okay. Thank you.

11 MR. BARRETT: Good afternoon, Your Honor. Peter
12 Barrett on behalf of Sony Electronics Inc., here with Eric
13 Seiler from Friedman Kaplan in New York and my colleague, Tim
14 Baird, from Kutak Rock. Mr. Seiler's going to present Sony's
15 opposition to the motion for partial summary judgment.

16 THE COURT: What happened to Mr. Goldwater?

17 MR. BARRETT: Mr. Goldwater will be back soon.
18 He's --

19 THE COURT: Oh, excellent.

20 MR. BARRETT: You haven't scared him away.

21 THE COURT: Okay. Well, I was hoping not, I mean,
22 but -- welcome, Mr. Seiler.

23 MR. SEILER: Well, thank you, Your Honor. And even
24 though I've been pro hac in this case for a while it's my
25 first time before the Court, so thank you for allowing me to

1 appear before you.

2 THE COURT: Of course.

3 MR. SEILER: And it's much appreciated.

4 So let me start where Your Honor ended. I think it
5 makes complete sense to do this once, but now that you've
6 heard at least a preview of the position I think it's fair for
7 my client for me to give you my preview, as well, on the key
8 issues. But I think -- and, by the way, we did suggest
9 exactly what Your Honor just proposed to the trustee's
10 counsel, and they --

11 THE COURT: Oh, I remember. Mr. Goldwater said that.

12 MR. SEILER: Right.

13 THE COURT: And I suggested that that might be a
14 better procedure as well.

15 MR. SEILER: And we were told they wouldn't do it.
16 Indeed, we asked to make our motion as a cross-motion to their
17 motion, and they told us they didn't think it was a proper
18 cross-motion. So when you look at our motion, which is now
19 returnable at the end of August, it's not styled as a cross-
20 motion, because they didn't agree to let us do it. I think it
21 would have been fine if they had agreed to it, but anyway,
22 that's where we are on that.

23 And I think it's worth just a minute to understand
24 why we couldn't work out the objective of not having six big
25 boxes of documents but just one schedule, because we thought

1 we were working toward.

2 THE COURT: I got all your box right here. That's --

3 MR. SEILER: Okay. Well, this is the box on the
4 papers that relate to the motion.

5 THE COURT: Oh.

6 MR. SEILER: But there are these bigger boxes that
7 are the underlying documents that relate to the individual
8 claims for credit that add up to the seventy-two (sic) million
9 dollars. And we told them all along we will sit with you and
10 go through each of the claims and tell you where there's a
11 disagreement as to amount, the date, when it was submitted.
12 And where there's no disagreement as to whether the program
13 event -- did you sell enough goods, did you put on the
14 advertising, whether they occurred or not -- we'll tell you
15 where there's no agreement and where there is agreement.
16 Because we were able to confirm that there were program
17 fulfillments for lots of them.

18 But they wanted something more. They wanted us to
19 stipulate to the validity of the claims. And we said wait a
20 minute. We don't think any of these claims are valid. Not
21 just the vast majority that are barred by the statute of
22 limitations, but all of them, because our position is they
23 can't get cash for claims where they --what they could have
24 done was say we have a credit. We've earned it. And we'd
25 like to buy some more goods.

1 But they went out of business. And they liquidated.
2 On January of 2009 they stopped buying goods. And we said
3 wait a minute. You can't use your credits. Sort of like
4 frequent flyer miles. You can use them to buy flights.
5 Sometimes even magazines. But you can't get cash. And our
6 position is you can't get cash.

7 And they say well, that's fine. That's your defense.
8 Just stipulate to the validity of our claim, and then you'll
9 have your defense. The Court will deal with it later. But
10 it's not a defense. It's one of the elements of their claim.

11 Take claim number 3, breach of contract. Is there a
12 contract? We agree about that. Did the plaintiff fulfill all
13 of its obligations under the contract? We say no. Because
14 one of their obligations was -- let's say it was an
15 advertising program. Did they put the ad up? Sure on some of
16 them. But then did they say we would like to buy more goods
17 because we put the ad up? No. They never ordered more goods.
18 So we say plaintiff, you didn't fulfill your obligations under
19 the contract.

20 And so we say that's your burden. That's not my
21 defense. Yes, my argument might defeat you. But it's your
22 burden to go forward. So I don't think it was right for our
23 client to be asked or for the Court to enter an order that
24 validated the claim subject to my defense, because it's their
25 element, their burden of proof.

1 And you'll notice in the argument today counsel never
2 said the word validity, but that's what's in his motion.
3 That's what was the problem. If they hadn't been seeking
4 validity this would have been the kind of discussion you
5 have -- I think it's Federal Rule of Evidence 1006.

6 You have a big mountain of underlying material. One
7 side puts together a schedule. I'm sure it happens all the
8 time in bankruptcy court for preference claims and the like.
9 And the other side says I don't agree with this. I do agree
10 with that. And then the amount of proof that has to come in
11 is reduced, because no Court would tolerate either party
12 putting on a witness to say yes, I had this document. This
13 document's true. This document's true. The parties should
14 work that out.

15 And we would have worked that out. And I think we
16 are working it out now through these papers that have been
17 submitted to the Court, which was an inefficient way to do it,
18 but that's why we got here. And -- but we do, by the way,
19 they wanted us to agree that all seventy-two million had been
20 fulfilled. And we said well, wait a minute. We've agreed
21 with you. And we could use Mr. -- the demonstrative is
22 perfect. We agreed with you that 7,878,000, not only were
23 they fulfilled. That's the second line of the second box
24 of --

25 THE COURT: I see that.

1 MR. SEILER: Right. We've agreed that they met the
2 fulfillment and that we've already given them credit for
3 those. The question is does it count against our unsecured
4 claim or does it count against our -- like a claim from the
5 last twenty days. And we're going to try and work that out
6 too. But the Court has nothing to find with respect to that
7 7.8 million dollars of claims, because they're going to get
8 credit for it. It's not going to be a dispute the Court needs
9 to adjudicate.

10 So the seventy-two million comes down to sixty-three
11 million. And then the sixty-three million basically -- you
12 don't see that number here, but it's seventy-two --

13 THE COURT: No. I'm writing it down.

14 MR. SEILER: -- right. If you --

15 THE COURT: -- so I'll remember it.

16 MR. SEILER: Right. So -- sorry. So it's exactly at
17 63.8 million, to be more precise. And so of that amount we
18 think 22,950,000 of it -- that's the subtotal of the third
19 box -- are claims that Ms. Fose included in her affidavit but
20 which there are documents that either dispute them or there
21 are no documents that support them. Nine million had a
22 document --I'll give you an example, that one of them, they
23 had to sell fifty-three million dollars of a certain kind of
24 good to earn the credit. And they sold twenty-four million.
25 And so it's on the list.

1 It came through the system that Ms. Fose is
2 responsible for bringing to the Court's attention, which, by
3 the way, she didn't do any of the inputting for. We don't
4 challenge her competence to do things. We just say she didn't
5 do this thing. So she's just looking at a printout. But
6 that -- it includes that line item for a credit for that
7 program. Well, they only did half the program. So we say you
8 didn't finish the program, you don't get the money.

9 And I believe now counsel agrees that he's going to
10 have to come forward with proof to show they did the things if
11 he wants to get the twenty-two million. Now, that's not so
12 terrible. It's less than a hundred categories of claims, and,
13 as often is the case, there are a few big ones and a lot of
14 tiny ones. So we'll probably focus on the big ones. They
15 probably won't spend the Court's time over a 500 dollar claim
16 in the middle of our trial.

17 But as to the other ones, the forty million dollar
18 number, we have said we have confirmatory information that you
19 did the things the program required with the exception of
20 ordering more goods. You can't get cash. And that's why --
21 that's an issue the Court's going to have to decide. Can they
22 or can't they get cash? And that'll be an important issue,
23 just as the statute of limitations issue will be important.

24 And let me just spend a minute on that, because I
25 think through a somewhat inefficient process we've gotten to a

1 coherent place, although we've wasted some of the Court's time
2 and a lot of the parties' money. They know which ones we
3 think we have confirmatory information, which ones we think
4 don't. I don't think there's any order for the Court to
5 enter, either today or in three weeks, on this motion, because
6 we'll work out a list of what is in each box. And then the
7 question will be whether they can prove that they win the
8 claim. For that they're going to have to prove that they can
9 get cash affirmatively.

10 But on the statute of limitations it sounds like --
11 well, I don't want to preclude them, but it sounds like they
12 don't dispute that the eighteen-month statute applies to post-
13 petition claims. And it sounds like they say but the time to
14 start running isn't the day the claim was submitted, because
15 if it is they're all -- they waited too long, because they
16 went out of business in the winter of '09. They didn't sue
17 until November of 2010. They put in for these claims before
18 eighteen months before they sued.

19 And so he's saying well, the clock doesn't start
20 running when we submit the claim. We earn the claim. We
21 submit the claim. That's the last step. You don't pay the
22 claim. It starts running in the middle of the mediation that
23 didn't work. I don't know what the event is. But it's pretty
24 clear from these programs that when they earn the claim by
25 performing the steps under the program and submit the request

1 it's either due in zero days or thirty days. Ninety-five
2 percent of the credits are due in zero days. They get
3 immediate credit. And a few of them were thirty days.

4 And we didn't pay. We didn't pay any of them. And
5 they waited until November of 2010. Not counsel here. I
6 think it was the predecessor counsel in the bankruptcy. They
7 didn't bring the case.

8 So it either is barred by the statute of limitations
9 or it's not. I think it's a pretty clear legal issue that the
10 Court will be able to address when it's returnable later in
11 August. Maybe there'll be a factual dispute about the accrual
12 event, so it's possible there'll be the factual issue, but I
13 think it's probably not.

14 And then there is this other issue. They're saying
15 well, wait a minute. Even if our claims 3, 5, 7, and 8 are
16 barred, our affirmative claims are barred, we still think we
17 can get recoupment or offset from these otherwise barred
18 claims. And we think that the law is against that, and we'll
19 address that. I think it's perfectly sensible, if that's
20 their argument, for that to be addressed by the Court all at
21 one time, because --

22 And now you take the whole case, our whole dispute
23 with them. Our preference claims that Kutak Rock lawyers have
24 been diligently done, and the contract claims, which I've been
25 doing. The statute of limitations applies to a big chunk of

1 what's between us. Or it doesn't. Because it's, like, fifty-
2 five million dollars of claims. And when we get the Court's
3 guidance on that that will help the parties understand what
4 the dispute between them is one way or the other, and that
5 might help parties talk further, because my understanding is
6 these kinds of preference actions usually get resolved. And
7 this is an unusual event that we're here both on the
8 preference action and the contract dispute, and we haven't
9 resolved anything, and we're on the -- not verge of trial, but
10 within weeks of trial.

11 And I think those are important things to be done.
12 I'm glad that counsel is willing to move the date a little
13 earlier if it's convenient for the Court, and we would address
14 any schedule.

15 I would like the opportunity to respond to their
16 cross-motion, if that's the way the Court -- it makes sense to
17 me for it to be a cross-motion. But whatever it is, there
18 ought to be an agreed upon briefing schedule between the
19 parties, with enough time for the Court to review the
20 materials and hold that oral argument on the arguments.

21 So my recommendation, just to sum up at the end, is
22 that this motion be held in abeyance. I don't think it would
23 be appropriate to enter an order under 7056 granting anything,
24 because it's not a claim or part of a claim. What it is is
25 allowing a summary of evidence instead of underlying evidence.

1 We will work that out without the need for a court
2 order. And where we don't, where there is need for additional
3 proof, I think counsel is willing to go forward. So I think
4 you could deny it without prejudice or hold it in abeyance. I
5 would request that the Court not enter an order today, and
6 then we hear argument on the issues that really will affect
7 the statute of limitations issue and any cross-motion at the
8 time the Court concludes.

9 And I thank you for attention to my argument.

10 THE COURT: All right. Thank you very much, Mr.
11 Seiler.

12 MR. FEINSTEIN: Your Honor, today is very
13 illuminating. I've never met Mr. Seiler before seeing him in
14 the hallway before. I have dealt with his partner. And I do
15 need to put on the record, Your Honor, several conversations
16 that really contradict what Mr. Seiler just represented to the
17 Court.

18 When we were last before Your Honor and discussing
19 the summary judgment motion that we had just filed, and Mr.
20 Goldwater was urging that the Court hear them at the same
21 time, we said can you tell us what your motion is about so
22 that we can understand whether or not it's a cross-motion,
23 because our motion was seeking a determination as to the
24 validity, the earning of the credits under the programs.

25 And I asked Mr. Goldwater point blank, is your motion

1 seeking a determination that these were not earned under the
2 applicable requirements of each of the programs? And he said
3 I'm not going to tell you. I'm not going to tell you what our
4 motion's about. And we've been fishing for a long time.

5 And, again, it's been very illuminating today to try
6 to found out whether there is a defense based on the rider,
7 whether there is a defense based on the notion of cash value
8 and future purchases. And we've been getting the runaround.
9 Plain and simple. We asked him could you please tell us. Is
10 your motion about the rider? Well, it's -- I don't -- I can't
11 tell you. It might. It might not be. We only found out
12 about the statute of limitations argument when they finally
13 made their motion. So I'm glad we made our motion, because it
14 fleshed out a very important issue six weeks before trial.

15 Now, as to whether or not Sony ever was willing to
16 engage us in reconciling the credits, I spoke with Mr.
17 Goldwater. So Mr. Caine was on the line as well. And this
18 was before we made the motion. And his words were they're all
19 in dispute. When we asked him could you please -- could we
20 sit and go through the credits? We tendered the schedule that
21 was attached to our complaint along with a separate
22 stipulation that we actually did make progress on. They were
23 willing to reconcile the preference payments, the amounts that
24 were paid and the invoices and so forth, but they were
25 unwilling to engage on reconciling the credits. And it seemed

1 to us that they were playing hide the ball, because, like I
2 said, their view was everything is in dispute.

3 So it is incredible, Your Honor, for Mr. Seiler, whom
4 I've never met before today, to address the Court and tell you
5 that Sony was always willing to reconcile these credits. They
6 simply weren't. Their unwillingness is what forced us to file
7 this motion.

8 But now I've got to come back, Your Honor, to an
9 issue that has been -- it's the subject of probably half a
10 dozen depositions that are coming up. It's the subject of
11 subpoenas that have been served on third parties. And that is
12 this very crisp, narrow issue.

13 If Circuit City or the Trust establishes the validity
14 of these credits, it goes past the factual compliance with the
15 program, and it either -- because it defeats statute of
16 limitations or, by way of recoupment, it has these credits to
17 use. Can the Trust offset these against Sony's claims against
18 the estate? Some fifty-five, sixty million dollars of claims.
19 And we've been trying to find out whether there is a defense
20 based on the rider.

21 In the complaint, Your Honor, we brought one of the
22 counsels a declaratory judgment that the rider didn't form the
23 basis for a defense. Why did we do this? Because Mr.
24 Barrett, dating back to 2010, dealing with Skadden Arps, who
25 tried to reconcile it back then, and we'll bring this out on

1 the next motion on the statute of limitations, simply wrote
2 back no cash value. And that's it. And we pressed and
3 pressed for answers for years and never got a straight answer
4 as to what Sony thinks this rider means and how Sony thinks
5 this rider and the language about cash value and the like
6 might operate as a defense to offset, because offset is most
7 of this case.

8 I mean, there's a very modest amount, a few million
9 dollars of credits above and beyond the amount of Sony's
10 claims, as to which seeking affirmative cash recovery would be
11 a live issue. But most of this case is about offset. And we
12 tried to get a straight answer whether Sony thinks the rider
13 and the no cash value precludes offset. And they won't talk
14 to us.

15 So now Mr. Seiler gets up in front of the Court, and
16 I think I'm hearing that this is a live issue, that their view
17 is if the Trust establishes the validity of these credits that
18 they could only have been used for purchases after Circuit
19 City went out of business and that they can't be used to
20 offset Sony's proofs of claim.

21 Now, our discovery that we've taken already, one of
22 Sony's witnesses, one of the Trust's witnesses -- and, again,
23 I'm sorry to put evidence in front of Your Honor, but this has
24 been a festering issue -- it is that routinely through the
25 life of this relationship, Sony-Circuit City, these credits

1 were earned, and they were applied to pending invoices. They
2 weren't applied to future purchases in the sense that a credit
3 was earned, that Circuit City would say I'd like to buy new
4 material and I'm going to use this as currency.

5 Instead, what happened routinely -- and their witness
6 testified to this in California last week -- is that when the
7 credits were earned Circuit City would cut a check for open
8 invoices, deduct the credit amount, so it was applying it to
9 old purchases, at least as of the time that the credits were
10 earned. These were, I suppose, future purchases, if you go
11 back to when the initial goods were purchased that gave rise
12 to the credit. But the parties practiced an industry
13 practice -- is that these credits are applied to open
14 invoices.

15 That's all we want to do in this case is establish
16 the validity -- it's not all that we want to do, but a major
17 portion of what we want to do is establish that we have enough
18 credits to offset the entirety of Sony's claims.

19 And I still don't know from hearing Mr. Seiler
20 whether he thinks that that's prohibited by the no cash value
21 concept, because offset is very different than affirmatively
22 recovering cash from Sony.

23 So I guess it's still a live issue, and I guess we
24 still have to go forward with subpoenas to Costco and Target
25 and all these other companies who've been doing business with

1 Sony, because our belief is that the same offsetting process
2 was routinely used in those relationships as it was in this
3 one. But this mantra of no cash value on future purchases has
4 been thrown at us without any further substance beyond what I
5 just heard today, which was the most illuminating thing I've
6 heard on the issue. So I guess it's still a live issue.

7 So in that respect the motion today served its
8 purpose. We've eliminated fifty million dollars of credits.
9 We've figured out that they have been sitting on this
10 eighteen-month limitation issue for a very long time, because
11 I don't think that was raised in the mediations or to us,
12 certainly, other than, kind of, a boilerplate allegation and
13 the answer.

14 So here we are. So I guess we understand that this
15 is going to have to be litigated, and I guess it's a contract
16 instruction and a legal issue, but our view is based on years
17 of history between the parties that if -- and to the extent
18 that the Trust establishes the validity of these credits,
19 regardless of the no cash value language, which is irrelevant,
20 regardless of the future purchase language, which is
21 irrelevant, these credits can be used to offset Sony's claims.

22 THE COURT: All right. Well, what I would like to do
23 is I think that the one thing that is clear to me is that you
24 accomplished what you needed to accomplish by filing your
25 motion for summary judgment. But I don't want to decide this

1 today. I want to decide it in the context of the cross-
2 motions for summary judgment where the issue is going to come
3 up, and I'm going to take it at one time and decide
4 everything. I think that is the much more efficient way to do
5 that.

6 I mean, I know exactly what your position is. I
7 mean, I'm not surprised at your position. I know exactly what
8 Mr. Seiler's position is. I'm not surprised by his position.
9 I mean, I can read these documents and go through it and see
10 it. I know exactly the arguments I'd be making. If you were
11 on the other side you know what arguments you'd be making. If
12 Mr. Seiler was sitting at this table he knows the arguments
13 you'd be making.

14 So, I mean, there's a lot of mysteries that are not
15 really mysteries. We all can figure this stuff out pretty
16 clearly as far -- not necessarily what the answer is, but at
17 least what the positions are.

18 MR. FEINSTEIN: Well, I'm smarter today than I was
19 yesterday, Your Honor. I'll tell you that.

20 THE COURT: Well, I'm glad for that.

21 MR. FEINSTEIN: But, Your Honor --

22 THE COURT: I don't believe you, but I'm glad for
23 that.

24 MR. FEINSTEIN: Well, I'm better educated today.

25 THE COURT: I meant that in a kind way. I'm sorry.

1 MR. FEINSTEIN: Actually --

2 THE COURT: But I could have been --

3 MR. FEINSTEIN: -- I might be a little less smart
4 today, as I'm getting old.

5 But, Your Honor, going forward into the discovery, I
6 think we want to -- again, if there's a question about this I
7 guess this would be a good time for Sony to raise it. We
8 don't intend to litigate, or through discovery and otherwise,
9 Circuit City's compliance with the program requirements, save
10 for what Mr. Seiler mentioned. Did it require that future
11 purchases be made? I don't think so. But in terms of whether
12 or not the program requirements in terms of sales amounts and
13 so forth were met, we think that we're done on that fifty
14 million. If there's a problem with that, before we begin a
15 dozen depositions and third-party subpoenas, we'd like to know
16 that.

17 And in terms of a briefing schedule, Your Honor, I
18 neglected to mention this in the opening, but what we propose
19 is that we file both an opposition to their summary judgment
20 motion and our cross-motion on the recoupment issue by next
21 Friday, the 8th, and have their response due the following
22 Friday, the 15th, with the hope that Your Honor could hear us
23 on the 21st, which, as I said, is one of the few days where
24 there's no deposition scheduled.

25 THE COURT: All right.

1 MR. SEILER: Could we just have till the Monday
2 instead of the Friday to respond?

3 THE COURT: I'm sorry. I'm going to let you -- yes.
4 I'm going to let both of you talk about this so we can figure
5 out what the dates are going to be and the like. I'm not
6 going to set a schedule without hearing from both sides.

7 But what you're proposing, Mr. Feinstein, is the 8th
8 for filing your motion --

9 MR. FEINSTEIN: In opposition to theirs. Right.

10 THE COURT: -- in opposition to theirs. Their
11 response on the 15th, and then we would hear this on the 21st
12 of August, which is a Thursday.

13 MR. FEINSTEIN: And, Your Honor, counsel just said
14 he'd like, I guess, until Monday the 18th. It's cutting into
15 Your Honor's time, not mine, because we can't reply. So, I
16 mean, I have no objection to that, but that's up to the Court.

17 THE COURT: Well, I'm not back until the 18th, and I
18 promise you I'm not going to read it until I get back. I
19 mean, I am going to --

20 MR. FEINSTEIN: That's a good choice.

21 THE COURT: -- read everything. I'll be back on the
22 18th, and so I would have no problem with it being -- if it's
23 filed on the 15th I'm not going to look at it until the 18th
24 anyway, so the 18th would be fine with me.

25 MR. SEILER: Thank you, Your Honor.

1 Excuse me for one second.

2 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

3 MR. FEINSTEIN: Excuse me for one second.

4 Your Honor, I have one other matter off point. I
5 know Your Honor will be gone for two weeks, and without
6 getting into the substance of it, we tried to initiate a meet
7 and confer on two document production issues that are, kind
8 of, hampering our ability to prepare for depositions. And I'm
9 not sure how we can arrange, if need be, to have motion
10 practice heard while Your Honor is away.

11 One is not producing, I think, what was required by
12 the order on the motion to compel, and the other is simply
13 that we produced a bunch of documents, communications between
14 the parties, and the production from Sony that came back
15 didn't have the very same documents. And we put them on
16 notice last week. There's a problem here. There's a hole in
17 their production where they were not prepared to meet and
18 confer with us this morning, but we're going to have to meet
19 and confer on this, and this could result in further motion
20 practice.

21 THE COURT: Okay. I will address that in just a
22 second. Let's get the briefing schedule down when we're going
23 to have a hearing.

24 Mr. Seiler, the 8th, I assume, is okay with you, but
25 you wanted to go with response on the 18th as opposed to the

1 15th. And then is the 21st available for you?

2 MR. SEILER: It's not perfect, but I'll make it -- if
3 it's good for the Court, it's good for me.

4 THE COURT: Okay. How much time do you think we're
5 going to need for the summary judgment?

6 MR. SEILER: Argument?

7 THE COURT: Yes. For the argument.

8 MR. SEILER: I think this -- I mean, I've never been
9 before Your Honor before today, so I don't know how much you
10 engage. I would think it would, you know, I would think a
11 couple --

12 THE COURT: I never ask any questions. I promise.

13 MR. SEILER: Somehow don't believe that, Your Honor.
14 A couple of hours. I can't imagine it would take more than
15 that. And maybe less.

16 THE COURT: Okay.

17 MR. SEILER: I don't think it's --

18 THE COURT: I'd like to do it in the morning, but
19 just because I have a dentist appointment in the afternoon.
20 If it was absolutely necessary I could reschedule that, but,
21 actually --

22 MR. SEILER: I was going to say --

23 THE COURT: --anything to get away from going to the
24 dentist.

25 MR. SEILER: I was going to say, if I had a -- I

1 would say --

2 THE COURT: I mean even listening to summary judgment
3 motions. But --

4 MR. SEILER: I'll bring my drill, Your Honor.

5 THE COURT: But if we could do it in the morning on
6 the 21st I can accommodate that. So if we set it, like, at 10
7 o'clock, would that work?

8 MR. SEILER: Sure. I mean, I would come down from
9 New York in the morning to do it, but that should be fine.

10 THE COURT: Okay. Does that work for you, Mr.
11 Feinstein?

12 MR. FEINSTEIN: Yes. We have depositions in the --
13 well, the depositions are here.

14 UNIDENTIFIED SPEAKER: They're here.

15 MR. FEINSTEIN: Yes. That's fine.

16 THE COURT: All right.

17 MR. FEINSTEIN: That's fine.

18 UNIDENTIFIED SPEAKER: That's right. I may be --

19 THE COURT: I thought you'd said that was a day where
20 you did not have depositions.

21 MR. FEINSTEIN: No, no. I'm sorry. The day before,
22 on the 20th --

23 THE COURT: Oh.

24 MR. FEINSTEIN: -- we have depositions, but they're
25 in Richmond.

1 THE COURT: They're in Richmond. Okay.

2 MR. FEINSTEIN: So we'll be here.

3 THE COURT: So the 21st. Okay. So the 21st, then,
4 will be the day, with the cross-motion due on the 8th and then
5 your reply on the 18th of August.

6 MR. SEILER: That's fine, Your Honor.

7 THE COURT: Does that suit?

8 MR. SEILER: That's fine, Your Honor.

9 THE COURT: Okay.

10 MR. SEILER: Thank you.

11 THE COURT: Very good. All right.

12 Now, we got that out of the way. Let's figure out
13 how you guys are going to meet me and argue these motions that
14 need to be argued about. Can we have a meet and confer --

15 MR. SEILER: Sure. So on the meet and confer we
16 certainly can. The request for the meet and confer came
17 eighteen minutes before the time that was set for the meet and
18 confer this morning.

19 THE COURT: Okay.

20 MR. SEILER: So we could meet and confer tomorrow.
21 I'm not the one who has the --

22 THE COURT: Excellent, because I'm around tomorrow,
23 so let's do --

24 MR. FEINSTEIN: Okay. That'd solve our problem.

25 THE COURT: Okay. We'll do that tomorrow.

1 MR. SEILER: It may not be -- it may be people who
2 are here, but I think -- let me just -- I think from --
3 because I know what their concerns are. Their concerns are
4 that their knowledge of the universe of documents that they
5 found makes them think that our search was less than complete.

6 So let's assume we meet and confer. What I'm going
7 to say to them, I'll say it now, is if you have this concern
8 we should investigate it. So I'm not going to have finished
9 the investigation by tomorrow.

10 So one of two things will happen when we investigate.
11 We'll either find that they're right, and we have more
12 documents, and we will give them to them, or we will find that
13 we can't find any more documents, and they'll either on that
14 be satisfied or they'll think no, we didn't do a good job, and
15 they'll want to make an application. And so I don't think
16 tomorrow is the day they're going to be in a position to make
17 that application, because I know I'm not going to have been
18 able to investigate their concerns through the client --

19 THE COURT: Right.

20 MR. SEILER: -- in twenty-four hours. So I think
21 saving time tomorrow is not really a useful place to do it.

22 I'm happy --

23 THE COURT: Well, I think --

24 MR. SEILER: --to make sure that we try to
25 accommodate their concerns. I don't know if their concerns

1 are valid or not valid, but I can't --

2 THE COURT: But talk to each other. Okay. You're
3 going to meet and confer tomorrow.

4 MR. SEILER: We'll talk to them tomorrow.

5 THE COURT: Okay.

6 MR. SEILER: The people from our side who are
7 knowledgeable about these issues will be available to talk to
8 them tomorrow.

9 THE COURT: That's what I want. And what you need to
10 let your client know is that I'm not going to tolerate
11 documents not being produced. I mean --

12 MR. SEILER: Right.

13 THE COURT: -- everything has to be produced. I
14 think I made that very clear last time. And if I didn't, I'm
15 making it --

16 MR. SEILER: Okay.

17 THE COURT: -- more clear today.

18 MR. SEILER: It was clear. But that we agree and
19 search doesn't mean we find what they expect we'll find.

20 THE COURT: I understand what you're saying.

21 MR. SEILER: And that's what may be the problem. But
22 because they think we should have found something more than we
23 found, that gives me the ammunition to tell the client wait a
24 minute. Why didn't you find this, this and this? Where did
25 you look? And so we will push them to do that.

1 And it isn't worth -- even if I disagreed with the
2 scope of what Your Honor has ordered that we produce, it isn't
3 worth our time or the Court's time or our money to fight about
4 it. We'll find it if it exists. We'll give it to them. If
5 it's irrelevant, it'll be irrelevant.

6 THE COURT: It's irrelevant.

7 MR. SEILER: And so I'm --

8 THE COURT: That's what I said last time.

9 MR. SEILER: We're past that. If it turns out that
10 we have to look in ten million places I'll come back to you,
11 because I'm not going to cause someone to do something that's
12 incredibly stupid without at least asking the Court. But
13 short of that we're going to do it. And I don't even know
14 what the shortage is.

15 THE COURT: That's why you want to --

16 MR. SEILER: It wasn't my issue.

17 THE COURT: -- talk to each other.

18 MR. SEILER: That's right.

19 THE COURT: That's what I want you to do.

20 MR. FEINSTEIN: But, Your Honor, we sent a detailed
21 e-mail last Thursday, so this wasn't a fresh topic from this
22 morning with seventeen minutes --

23 THE COURT: I am confident. I know how this stuff
24 works.

25 MR. FEINSTEIN: -- with copies of documents that we

1 got that should have come from them. We have a key deposition
2 tomorrow of their 30(b)(6) witness, so we're being put behind
3 the eight ball here when they drag their feet. We didn't get
4 an acknowledgement from last week's e-mail that they even
5 received it. So we had to call this morning saying could we
6 meet and confer sometime before court. It wasn't on seventeen
7 minutes notice. We said anytime this morning before court.
8 So we're getting slow walked here, and we're being prejudiced
9 in a number of depositions we're trying to take. They were
10 supposed to produce these documents.

11 THE COURT: Okay. And I can promise you that if
12 there are games being played then we're going to expand
13 depositions. I'm not going to tolerate that kind of thing.
14 But I want you to talk to each other.

15 MR. FEINSTEIN: Okay.

16 THE COURT: I mean, you're both saying this is what I
17 think the other person's going to say. I am confident you
18 sent an e-mail. I am confident that everybody is acting just
19 the way they should in this kind of litigation. But I want
20 you to talk with each other, see if you can narrow this down,
21 and if there are documents that should have been produced and
22 there is some sort of a slow walk going on, you will let me
23 know that, and I will take appropriate action if I find that
24 that's what happened.

25 I don't want it to happen, and I'm saying that very

1 clearly. I don't expect it to happen. But if it does I will
2 address that.

3 MR. SEILER: Your Honor, and this witness, we've
4 already agreed, because we knew we weren't likely to be able
5 to produce everything in time. We agreed, Your Honor will
6 remember, to carve -- they could choose how much of the time
7 they wanted to carve out of the seven hours and save, and we
8 would bring the witness back again. So that is an issue.

9 But we want to get this done. We didn't agree that
10 it was relevant, but you ruled, and so we are going to comply.
11 And as to --

12 But one thing I would say. I don't think we've been
13 communicating well. Not just the two of us. We never
14 communicated at all before today. But I don't think
15 collectively the two sides have effectively communicated,
16 because we wouldn't be having these discussions in front of
17 you if we did. And so I think it's our job to do better, even
18 if you weren't telling us to do better. And you may be
19 suspicious about whether we will do better, but we'll prove --
20 at least on our side we will prove we can do better.

21 THE COURT: Now that the two of you have met each
22 other I'd like you to become best friends.

23 UNIDENTIFIED SPEAKER: No.

24 THE COURT: And -- yes, exactly.

25 MR. FEINSTEIN: Your Honor, before we become so

1 friendly I need to correct something that's really important
2 that Mr. Seiler just said to the Court.

3 We talked in the context of the motion to compel
4 about reserving some time for Ms. Sanscartier's deposition to
5 the extent that a circumscribed set of information, which was
6 communications with other vendors, was going to roll in later.
7 And we haven't gotten that yet. So I guess we'll have to
8 continue for that purpose.

9 But what I'm talking about in terms of failure to
10 produce is something that was called for by our initial
11 document request, which were communications between Sony and
12 Circuit City. That hasn't been produced. There is no
13 provision in any order that lets us take a second bite at Ms.
14 Sanscartier on stuff that -- communications between the
15 parties that are being produced late or not at all. That's
16 very different.

17 MR. SEILER: Look, if there --

18 MR. FEINSTEIN: And that's what we're troubled by.

19 MR. SEILER: If there are documents that we have that
20 we should have produced, and we find them late for some
21 reason, whether defensible or not, he'll have appropriate
22 remedy, and I won't fight with him about it. It sounds like
23 some of these documents he actually has. Sometimes one party
24 still has a document and the other one doesn't. So if he has
25 the document he can ask about it. He doesn't need to get it

1 from me.

2 But if we fall short in our document production we
3 understand there'll be consequences. And whether it's just
4 because that's what happens in life or some other reason,
5 we're not trying to hide the ball, and we're doing it as fast
6 as we can and as competently as we can.

7 THE COURT: All right. And --

8 MR. SEILER: And we will communicate better than we
9 have. Yes.

10 THE COURT: And if there are problems with the
11 documents, I mean, we'll go into stoppage time with regard to
12 the deposition and make sure that you have an adequate
13 opportunity to be able to examine the witness at the --

14 MR. FEINSTEIN: Well, what I'm going on record today,
15 Your Honor, we have Ms. Sanscartier's deposition tomorrow on
16 Sony-Circuit City issues. Forget about Target and Costco. We
17 don't think we have all the documents. We've shown them
18 documents that were exchanged between the parties that we
19 produced and they didn't. So we think there's a shortage.

20 THE COURT: Okay.

21 MR. FEINSTEIN: And our deposition is tomorrow, so --

22 THE COURT: And you're going to talk, the two of you,
23 and see if that can't be worked out. And if it can, great.
24 If it can't, then I'll hear you at the appropriate time. And
25 I promise if I agree with your position that there'll be an

1 appropriate remedy.

2 MR. FEINSTEIN: Thank you. Now, there is an issue
3 about their production under the order that Your Honor entered
4 on our motion to compel. And Your Honor may recall there were
5 three buckets of documents. The first one that came
6 immediately was the dealer agreements with the ten or so
7 vendors. The third bucket was the communications, the e-mails
8 and the like, and that's -- everybody understood that was
9 going to roll in, they would do the best that they can, and if
10 they didn't, we would continue Ms. Sanscartier's deposition.

11 It's the second one that we're concerned about. The
12 second one was data that shows how the credits were applied.
13 And this goes to the offset issue, because our view is that
14 all of the dealers were routinely taking earned credits and
15 not applying them to future purchases but applying them to
16 pending invoices. So we asked for -- deliberately asked for
17 the information, how were these credits applied, to prove out
18 that this was Sony's custom and practice with all dealers, to
19 take credits and apply them to open invoices.

20 So what we get back was here's a list of the credits
21 and here's the dates that they were applied. But it doesn't
22 tell us what they were applied to, which was really the heart
23 of what we were seeking: Were they applied to open invoices?
24 And Sony could cut this all short by just acknowledging yes,
25 everybody applies credits to open invoices. But they're not;

1 they won't do that. So we have to prove this, and this is a
2 critical piece of evidence that they were ordered to produce
3 and failed to.

4 MR. SEILER: All right. So we haven't had the meet
5 and confer. And I'm not the one who has most of the
6 knowledge, so I say this all with some modest trepidation, but
7 we don't believe every vendor is the same, so we don't share
8 their view on relevance. But I don't think their request,
9 fairly read in the first instance, had the degree of
10 particularity that their request now does, as it evolves. But
11 we will deal with their request as it evolves. And if it's
12 something that we can physically do, because we have the
13 information, and it isn't unbelievably burdensome to do, we
14 will just do it, without troubling anyone any further and
15 we'll do it as quickly as we can. If it is ridiculously
16 burdensome, we'll suggest a less burdensome way. And if you
17 don't want to take the deposition tomorrow, because you really
18 want to have everything lined up, you should talk to me about
19 that too.

20 None of this -- we're not trying to create problems.
21 And I think all of this has illustrated to me that,
22 collectively, we've not communicated very well. I will take
23 responsibility for that on our side, and I will try and do
24 better. But I don't see why we should be wasting the Court's
25 time to have these conversations. I don't think it's the

1 appropriate thing to do; we should try and work it out first.

2 MR. FEINSTEIN: On this point, Your Honor, we met, we
3 conferred, we moved to compel, we got a court order. Now
4 we're at sanctions time. They were supposed to produce that.
5 If there was some --

6 MR. SEILER: See, that's --

7 MR. FEINSTEIN: If there was some ambiguity, we were
8 in front of Your Honor the last time. We worked on a form of
9 order; we submitted it: Give us the data that shows how the
10 credits were applied. And what we got back fell way short.

11 MR. SEILER: So we think we've complied with the
12 order, but maybe this is why we haven't gotten along so well,
13 because we escalate from let's have a meet and confer, in
14 eighteen minutes' notice, to its sanctions time, in the space
15 of five minutes. That's not how --

16 THE COURT: We're not --

17 MR. SEILER: -- we should practice law.

18 THE COURT: -- going to do that today. I agree. And
19 that's not what we're going to do. But what Mr. Feinstein's
20 saying is exactly correct; I did issue an order and did
21 compel, and the order has to be complied with. So take a good
22 look at the order, meet with Mr. Feinstein, make sure that
23 complying with the spirit of the order, and get whatever needs
24 to be done. That's what I'm saying.

25 MR. SEILER: Okay.

1 THE COURT: Okay?

2 MR. SEILER: Thank you.

3 THE COURT: Thank you.

4 MR. FEINSTEIN: Thank you, Your Honor.

5 THE COURT: All right.

6 MS. TAVENNER: Good afternoon, Your Honor. Lynn

7 Tavenner, also appearing on behalf of the trust.

8 While we still have Sony's counsel in here, I was
9 rising to address item 2, but I have been involved in the Sony
10 matter for more than eighteen minutes, and have been involved
11 since the inception when the adversary was filed. And despite
12 the communication that has been promised today, I would
13 respectfully request from Your Honor, hearing that you are
14 going out of town, and hearing that there are issues that
15 potentially could be percolating, serious issues relating to
16 moving forward to prepare for trial, that Your Honor advise us
17 of appropriate chambers that we could contact in your absence,
18 in the event that matters can't wait for the two weeks that
19 you're gone.

20 THE COURT: I will check with my colleagues, both on
21 this court and in the district court, and see who might be
22 available to be able to do that. I know that Judge Phillips
23 is not available, which would be the logical person. But
24 perhaps Judge Payne or Judge Hudson would be available; I can
25 talk with them. I know that obviously Judge Spencer is not

1 available --

2 MS. TAVENNER: Other --

3 THE COURT: -- for anything. I mean, quite frankly,
4 I just don't know what their calendars are and what they would
5 be doing. Or I might be able to get one of my colleagues in
6 one of the other courts. Judge Santoro would not be able to
7 do it because he conducted the mediation. But perhaps Judge
8 Kenney or Judge Mayer, if they're around. But I will see
9 about that.

10 And what I will do is let you and Mr. Barrett know,
11 and my chambers will call your office and Mr. Barrett's office
12 tomorrow with what would be the appropriate way of handling
13 it. But actually, the appropriate way of handling it is that
14 nobody be called while I'm gone, because that's going to make
15 me very upset, which I was hoping I was communicating,
16 obviously very ineffectively, beforehand, but we'll see how it
17 plays out.

18 MS. TAVENNER: Thank you, Your Honor.

19 THE COURT: All right.

20 MS. TAVENNER: That does bring us to item 2 then on
21 today's docket.

22 THE COURT: May Mr. Seiler be excused?

23 MR. BARRETT: And Mr. Barrett?

24 THE COURT: Okay. Mr. Barrett has to sit here,
25 but --

1 MS. TAVENNER: I'm happy for them to be excused, Your
2 Honor.

3 THE COURT: Oh, you may be excused, Mr. Barrett.

4 MR. BARRETT: Thank you, Your Honor.

5 MR. SEILER: Thank you very much, Your Honor.

6 THE COURT: You're welcome.

7 MS. TAVENNER: Your Honor, with respect to the next
8 matter on the docket, this one we will not take up a great
9 deal of your time. It's in the adversary against the State of
10 Illinois. We had filed a motion for summary judgment and
11 actually had reported to you that we had reached a resolution
12 and were asking for additional time to have the settlement
13 documented, consummated, and had provided in our agenda that
14 we were going to request additional time. I'm happy to report
15 that we do not need that now --

16 THE COURT: Okay.

17 MS. TAVENNER: -- and we will be filing the
18 appropriate paperwork to have the matter dismissed.

19 THE COURT: Excellent. Okay.

20 MS. TAVENNER: And then that does bring us to two
21 additional matters that are on the docket that Mr. Caine will
22 handle today.

23 THE COURT: All right. Mr. Caine?

24 MR. CAINE: Good afternoon, Your Honor. For the
25 record, Andrew Caine, Pachulski Stang Ziehl & Jones for the

1 liquidating trust. I believe the first matter is Unical.

2 THE COURT: I would just note for the record that
3 we're three games up.

4 MR. CAINE: Yes.

5 THE COURT: Okay. Go on.

6 MR. CAINE: Yes. Thank you, Your Honor, very happy
7 about that. I confirmed with Ms. Beran she would display a
8 Dodger bobble head in her office if I gave her one; she said
9 yes.

10 In the matter of the claim of Unical Enterprises,
11 Your Honor, the trust has filed a motion for summary judgment
12 in order to eliminate this claim. There has been no response
13 by Unical, which is not surprising to us. Unical and Circuit
14 City, prior to the bankruptcy petition, engaged in litigation
15 in federal court in California, and the result was a victory
16 by Circuit City. Unical appealed and the bankruptcy petition
17 was then filed. Unical sought relief from stay in order to
18 prosecute its appeal before the Ninth Circuit, and that
19 application was denied.

20 A number of years go by, Unical files a claim for
21 over four million dollars in this court on the identical
22 breach of contract claim that it asserted in the district
23 court in California, upon which it lost, and it was then
24 appealing to the Ninth Circuit.

25 After a number of years, we approached Unical and

1 suggested that we grant them relief from the plan injunction
2 to liquidate their claim, if they could, through the
3 prosecutions at appeal before the Ninth Circuit. Unical
4 declined. They wanted to be able to enforce whatever judgment
5 they got. So we filed a motion before this Court for relief
6 from the preliminary injunction to allow Unical to proceed
7 with their Ninth Circuit appeal, and then we'd come back to
8 this Court, depending upon how that happened.

9 Your Honor granted that motion. We then gave notice
10 to the Ninth Circuit of that motion. The Ninth Circuit then
11 set a briefing schedule. Unical did not file its appellate's
12 opening brief. The Ninth Circuit, as a result, dismissed the
13 appeal. So we have now come back to Your Honor with evidence
14 of all of that procedure, and the motion includes copies of
15 all of the various orders and the dismissal by the Ninth
16 Circuit, and asked, under the doctrines of claim preclusion
17 and issue preclusion, all in the general doctrine of res
18 judicata, that the Unical claim be disallowed in its entirety,
19 for it has no validity. They lost in the district court;
20 their appeal was dismissed. So Your Honor, we ask that you
21 grant an order disallowing the Unical claim in its entirety.

22 THE COURT: Does any party wish to be heard in
23 connection with the motion to disallow the Unical claim in its
24 entirety?

25 All right. There being no objection and no objection

1 have been filed, the Court will grant that motion and will
2 disallow the Unical claim in full.

3 MR. CAINE: Thank you, Your Honor. We will prepare
4 an order.

5 The next matter we're here on, Your Honor, is the
6 trust's thirty-first omnibus objection with respect to the
7 claims of Vadim Rylov. Those are two claims, 15022 and 15023.
8 We have set this matter for a substantive hearing with respect
9 to those claims, Your Honor, and Ms. Ferguson is here from the
10 trust, prepared to testify, if need be, with respect to the
11 matter.

12 Mr. Rylov filed two claims, Your Honor, as a putative
13 member, to use his terms, of a class that was proposed in a
14 class claim under the name of Mr. Skaf. Your Honor might
15 recall that this class claim intended to prosecute a claim
16 based on overtime, lunch time, and other nonexempt employee
17 claims under the laws of the State of California.

18 The putative class plaintiffs attempted to proceed
19 with this class claim. Your Honor denied that. They went up
20 on appeal all the way to the Fourth Circuit, and it was denied
21 all the way up to the Fourth Circuit. So the individuals
22 whose names were the proposed class plaintiffs then filed
23 individual claims, and those claims have been resolved, Your
24 Honor.

25 Mr. Rylov never filed any substantive claim, other

1 than to say I'm a member of this putative claim, so the trust
2 objected. The trust objected on both procedural and
3 substantive grounds. First, with respect to procedure, Your
4 Honor, which is independent of grounds to dismiss and disallow
5 both of the claims, the claims are duplicative. And second,
6 they were filed late. The claims bar date was in January of
7 2009 and the claims were filed in May of 2010.

8 Ms. Ferguson, if Your Honor wishes, can testify with
9 respect to the bar dates, the notices that went out, and the
10 timing of the filings of the claims. Those are all
11 identified, Your Honor, in the objection -- on this objection
12 itself at pages 3 of 4.

13 THE COURT: And the Court is very familiar with the
14 bar dates that have been established in this case.

15 MR. CAINE: So on lateness alone, Your Honor, and
16 duplication, both of those claims should be disallowed in
17 their entirety.

18 With respect to substance, Your Honor, as I
19 mentioned, Mr. Rylov claims to be a member of the putative
20 class. His response to the claim objection says only that he
21 would produce evidence, when the time comes, of his
22 entitlement to some claim. He didn't respond to the lateness.
23 He didn't address any of the substance itself.

24 We have done a thorough investigation of these
25 claims, prior to resolving the matters with the putative class

1 plaintiffs, and determined, through conversations with both
2 inside Circuit City counsel and outside counsel, that they've
3 done a thorough investigation. We're very much aware of the
4 exempt versus nonexempt issues over time, that these are
5 managerial employees, and that they were not entitled to
6 overtime. And we're confident that the trust would prevail if
7 the substance ever came to an adjudication.

8 I'm not at liberty to speak to the terms of the
9 settlements we reached with the putative plaintiffs, but they
10 were pretty nominal.

11 So Your Honor, unless you wish to hear from Ms.
12 Ferguson, or have any further questions, we ask that you
13 disallow both Rylov claims in their entirety.

14 THE COURT: All right. Does any party wish to be
15 heard in connection with the claims 15022 and 15023 of
16 claimant Rylov?

17 All right. There being no response, the Court will
18 sustain the objection to both claims of Mr. Rylov and ask you
19 to submit an order to that effect.

20 MR. CAINE: We'll do so.

21 THE COURT: All right.

22 MR. CAINE: Thank you very much, Your Honor.

23 THE COURT: Are there any other matters that we need
24 to take up in the Circuit City case today?

25 MS. TAVENNER: No, Your Honor.

1 THE COURT: Okay. Very good. As I indicated, I'll
2 be in touch with your office, but I sincerely help that
3 everything is going to get worked out. And good luck with
4 those depositions.

5 MS. TAVENNER: Thank you, Your Honor.

6 THE COURT: All right.

7 THE CLERK: All rise. Court is now adjourned.

8 (Whereupon these proceedings were concluded at 3:14 PM)

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C E R T I F I C A T I O N

I, Hana Copperman, the court approved transcriber, do
hereby certify the foregoing is a true and correct transcript
from the official electronic sound recording of the
proceedings in the above-entitled matter.

Hana Copperman

September 9, 2014

HANA COPPERMAN

DATE

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